

E-FILED - 12/18/08

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

KEVIN DUGAN,

Defendant.

NO. C-03-20010-RMW

ORDER REGARDING DEFENDANT'S
MOTION FOR NEW TRIAL

On November 19, 2007 defendant Kevin Dugan was found guilty by a jury of four of the five charges brought against him. Specifically, he was found guilty of manufacturing more than 1000 marijuana plants (21 U.S.C. § 841(b)(1)(A)(ii)), possession with intent to distribute more than 1000 marijuana plants (21 U.S.C. § 841(b)(1)(A)(ii)), maintaining a place for the purpose of manufacturing a controlled substance (21 U.S.C. § 856(a)(1)); and being an unlawful user of a controlled substance in possession of a firearm (18 U.S.C. § 922(g)(3)). Dugan was found not guilty of a count charging him with carrying a firearm in furtherance of a drug trafficking crime (18 U.S.C. § 924(c)(1)(A)). Since the jury's verdict on November 19, 2007, Dugan has filed a variety of post trial motions. This order addresses the ones that are still pending.

THE POST-TRIAL FILINGS

Dugan has been represented by numerous attorneys at various times during the proceedings against him. Since the date on which Dugan was found guilty, he has been represented by five different attorneys, all of whom he has now discharged. The following papers have been filed since Dugan's conviction either by Dugan personally or by counsel he previously retained:

DATE OF FILING	TITLE OF PAPER AND DOCKET #	FILED BY
November 26, 2007	Notice of Motion for New Trial (Docket # 216)	Attorney Furstman
December 4, 2007	Motion to Petition Federal Court for New Trial (Docket # 218)	Defendant
January 3, 2007	Motion to Petition Federal Court for Dismissal of Charges due to Lapse of Time (Docket # 221)	Defendant
January 7, 2007	Motion to Dismiss Indictment due to Unnecessary Delay (Docket # 224)	Defendant
January 7, 2007	Motion to Dismiss Indictment Because Time for Trial Not Set In Accordance with Speedy Trial Rights (Docket # 225)	Defendant
January 7, 2007	Motion to Dismiss Indictment due to Being Generally Deprived of Constitutional Rights to a Speedy Trial (Docket # 226)	Defendant
January 7, 2007	Motion to Dismiss Indictment due to Commencement of Time Period (Docket # 227)	Defendant
January 7, 2007	Motion to Dismiss due to Prejudice to Accused (Docket # 228)	Defendant
January 10, 2007	Motion to Dismiss or Drop Indictment Pursuant to Violation of Right Under Speedy Trial Act (Docket # 230)	Defendant
January 10, 2007	Motion to Dismiss Indictment Pursuant to Violation of Federal Rules of Criminal	Defendant

1		Procedure (Docket # 231)	
2	January 10, 2007	Motion to Dismiss Indictment Pursuant to Criminal Procedure (Docket # 233)	Defendant
3			
4	January 10, 2007	Motion to Dismiss Indictment in Accordance with Interval Between Dismissal and Refiling (Docket # 234)	Defendant
5			
6	January 10, 2007	Motion to Dismiss Indictment (Generally) (Docket #235)	Defendant
7			
8	January 10, 2007	Motion to Dismiss Indictment Indictment Pursuant to Violation of Speedy Trial Act (Docket # 237)	Defendant
9			
10	January 18, 2007	Supplemental Brief in Support Motion to Dismiss for Violation of Speedy Trial Act (Docket # 240)	Attorneys Furstman and Michael
11			
12			
13	February 19, 2008	Motion to Reconsider Detention Order (Docket # 248)	Attorney Young
14			
15	August 29, 2008	Supplemental Memorandum in Support of Defendant's Motion for New Trial (Docket # 286)	Attorney Riordan
16			
17	September 24, 2008	Supplemental Memorandum in Support of Defendant's Motion for New Trial (Docket # 293)	Defendant
18			
19	September 24, 2008	Motion to Reconsider Detention Order (Docket # 294)	Defendant
20			
21	October 30, 2008	Petition for Default Judgment and Estoppel by Silence (Docket # 300)	Defendant
22			
23	October 30, 2008	Petition for Default Judgment and or Nil Dicit Judgment (Docket # 304)	Defendant
24			
25	November 3, 2008	Reply Rebuttal to Government's Opposition to Defendant's Motion for New Trial (Docket # 303)	Defendant
26			
27	November 26, 2008	Motion for Clarification (Docket # 305)	Defendant
28			
	December 8, 2008	Crimen Falsi (Docket # 306)	Defendant

1 On January 15, 2008 the court entered an order that since Mr. Dugan was
2 represented by counsel all motions had to be filed through counsel and that the court would
3 not recognize motions filed by Dugan himself. However, since Dugan has now discharged
4 all his counsel and chosen to represent himself, the court has considered Dugan's filings
5 identified as docket numbers 293, 294, 300, 304, 303, 305 and 306 along with the
6 memoranda previously filed by counsel in support of defendant's Motion for New Trial and
7 for dismissal for alleged Speedy Trial Act violations. The court has also considered the
8 papers filed in opposition by the government.

9 On February 28, 2008 the court denied Dugan's Motion to Reconsider Detention
10 Order (Docket # 248). On December 8, 2008 the court denied Dugan's second Motion to
11 Reconsider Detention Order (Docket # 307). The court now issues its order on the
12 defendant's other motions. Despite the various captions on the papers, they all seek to
13 vacate Dugan's conviction and provide him with a new trial or dismiss the case.

14 **Timeliness of Motion for New Trial**

15 Federal Rule of Criminal Procedure 33 provides: "Any motion for a new trial
16 grounded on any reason other than newly discovered evidence *must* be filed within 7 days
17 after the verdict or finding of guilty." (Emphasis added). The jury returned its verdict on
18 November 19, 2007. The only motion filed within the 7 day period was that filed by
19 Attorney Furstman on November 26, 2007. That timely motion listed the bases on which
20 Dugan was seeking a new trial but provided no points and authorities or supportive brief. In
21 essence, Dugan asserted that the guilty verdicts were contrary to the evidence presented
22 at trial and to the court's instructions and that the jury's conclusion that there were more
23 than 1000 marijuana plants was not supported by the evidence. The other motions for a
24 new trial are untimely and the court hereby denies those late filed motions on the separate
25 ground of untimeliness to the extent that they seek relief not included in Dugan's timely filed
26 motion.

27 **Standard for New Trial**

28 "A motion for a new trial is directed to the discretion of the district judge. It should be

1 granted 'only in exceptional cases in which the evidence preponderates heavily against the
 2 verdict.' 2 Wright, Federal Practice and Procedure, Criminal § 553 at 487 (1969)." *United*
 3 *States v. Pimentel*, 654 F.2d 538, 545 (9th Cir. 1981). However,

4 A Motion for Acquittal and a Motion for New Trial based on the ground that
 5 the verdict is against the great weight of the evidence are governed by very
 6 different standards. The Motion for New Trial involves a much broader
 7 standard of review than a Motion for Acquittal. A verdict may well be against
 8 the great weight of the evidence, but, nevertheless, be substantial enough to
 9 permit reasonable jurors to draw an inference of guilt. In a Motion for New
 10 Trial, the trial judge can consider the credibility of the witnesses and the
 11 weight of the evidence to insure that there is not a miscarriage of justice.

12 *United States v. Turner*, 490 F.Supp. 583, 593 (E.D. Mich. 1979). With these standards in
 13 mind, the court will first address the timely raised issues and then will discuss the
 14 substantive questions raised in the time barred motions.

15 **Timely New Trial Claims**

16 **A. Dugan's Claim that the Guilty Verdicts Were Contrary to the Evidence** 17 **and the Court's Instructions**

18 The evidence overwhelming supported the verdict on each of the counts on which
 19 the jury found the defendant guilty. The court suspects that what Attorney Furstman
 20 intended to raise in his motion was a claim that the evidence did not support a finding that
 21 more than 1000 plants were found at Dugan's residence and that the jury could not have
 22 made that finding in light of the court's instruction that a "plant" had to be supported by its
 23 own root system and that a cutting is not a "plant" unless there is readily observable
 24 evidence of root formation (until a cutting develops roots of its own, it is not a plant itself but
 25 a mere piece of some other plant). The sufficiency of the evidence to support the jury's
 26 finding of more than 1000 plants is discussed below. To the extent the motion may be
 27 attempting to raise an insufficiency of the evidence claim in some other respect, it is
 28 denied.

29 **B. Dugan's Claim that There Is Insufficient Evidence to Support a Finding** 30 **of More than 1000 Marijuana Plants**

31 Dugan contends that the evidence that there were more than 1000 marijuana plants
 32 is not supported by the evidence. Although there was testimony by San Jose Officer
 33 Blanco that there were approximately 1087 plants, the finding of that number depends

1 almost exclusively on the correctness of his count and that all the smaller "plants" he
2 counted had root structures. Although the evidence justified denial of the defendant's Rule
3 29 motion on the subject, the court finds the evidence so lacking as to justify granting a
4 new trial on the number or sentencing the defendant on the basis that the evidence showed
5 more than 100 and less than 1000 plants. The evidence beyond any doubt showed more
6 than 100 plants. Blanco counted 410 on 1 to 2 foot plants and 16 large plants. Other
7 testimony by those present supported the fact that there were a large number of plants.

8 The reasons that the court concludes that the evidence was insufficient to fairly
9 conclude there were more than 1000 plants include: (1) the lack of photographs of the
10 plants including the smaller ones; (2) Blanco's count was not verified by anyone; (3) the
11 evidence that all the smaller "plants" had root structures was extremely weak; and (4) the
12 evidence was immediately destroyed without documenting any method of verifying the
13 count or that all the "plants" were, in fact, marijuana. The court does not suggest that
14 Blanco was other than honest in his count. However, he could have made mistakes in
15 counting, multiplication, identification of root structures and even the type of plant. As
16 noted, if Blanco determined the number of small "plants" by multiplication of rows and
17 columns, it is odd that the result was 661, a prime number.

18 Since there is no question but that there were more than 100 plants, the government
19 can choose between a new trial on the count or accepting the more than 100 but less than
20 1000 number for sentencing.

21 **C. Dugan's Claim that Count Five Is Void for Vagueness as Not Affording**
22 **Adequate Notice¹**

23 Dugan challenges his conviction for a violation of 18 U.S.C. § 922(g)(3) on the basis
24 that the statute is void for vagueness. The government submits that Dugan's claim is
25 untimely and not a basis for a new trial motion. The government argues that the claim was
26 waived because it was not made prior to trial. See Fed. R. Crim. P. 12(b)(3)(A).

27 ¹ Dugan's claims regarding the unconstitutionality of § 922(g)(3) are not seeking
28 a new trial. If Dugan's claims have merit, the verdict on § 922(g)(3) count should be reversed
and Dugan acquitted on that claim.

1 Regardless of the timeliness of the motion, it lacks substantive merit. When a statute is
2 challenged as unconstitutionally vague in a case not involving the First Amendment, the
3 court does not consider whether the statute is unconstitutional on its face. Rather, its
4 concern is whether the statute is impermissibly vague in the circumstances of the case.
5 *United States v. Purdy*, 264 F.3d 809, 811 (9th Cir. 2001). The resolution of this issue turns
6 on whether the language of § 922(g)(3) put Dugan on notice that his conduct was criminal.
7 *See id.*; *United States v. Ocegueda*, 564 F.1363, 1365 (9th Cir. 1977).

8 Dugan's situation is analogous to that of the defendants in *Purdy* and *Ocegueda*
9 who consistently used drugs over a prolonged period of time and contemporaneously
10 possessed or purchased firearms thus putting them on notice that they qualified as
11 "unlawful users." *See Purdy*, 264 F.3d at 812-813, *Ocegueda*, 564 F.2d at 1365-66. Here,
12 the evidence supports the finding that Dugan consistently used marijuana over a prolonged
13 period of time contemporaneously with his possession of numerous firearms. The
14 evidence included former ATF agent Heather Curtis's testimony that Dugan told her he
15 used marijuana daily for a 6-7 year period, the numerous marijuana plants and other
16 related evidence discovered in Dugan's house, Dugan's medical records reflecting frequent
17 use, Dugan's understanding that marijuana use was against federal law and information
18 contained on papers Dugan filed with the Bureau of Alcohol, Tobacco and Firearms
19 advising that it was unlawful to possess firearms while being an unlawful user. In
20 summary, the evidence fully supports a finding that Dugan was on notice that he qualified
21 as an unlawful user of drugs and that the statute as applied to Dugan's case is not void for
22 vagueness.

23 **D. Dugan's Claim that Count Five Violates the Second Amendment**

24 Dugan claims that the recent Supreme Court decision in *District of Columbia v.*
25 *Heller*, 128 S.Ct. 2783 (2008) supports his contention that § 922(g)(3) violates the Second
26 Amendment. *Heller* post-dates Dugan's conviction and holds that certain statutes banning
27 handgun possession in the home violate the Second Amendment. Dugan contends that
28 *Heller's* rationale applies to § 922(g)(3). The court disagrees. No case has so held.

1 Further, *Heller* specifically pointed out:

2 Like most rights, the right secured by the Second Amendment is not
 3 unlimited. . . . Although we do not undertake an exhaustive historical analysis
 4 today of the full scope of the Second Amendment, nothing in our opinion
 5 should be taken to cast doubt on longstanding prohibitions on the possession
 of firearms by felons and the mentally ill, or laws forbidding the carrying of
 firearms in sensitive places such as schools and government buildings, or
 laws imposing conditions and qualifications on the commercial sale of arms.

6 *Id.* at 2816-7. Section 922(g)(3) is a similar prohibition to those listed by the Supreme
 7 Court and has previously withstood a Second Amendment challenge. *United States v.*
 8 *Patterson*, 431 F.3d 832 (5th Cir. 2005). Dugan's motion based upon an alleged violation
 9 of the Second Amendment is denied.

10 **Untimely New Trial Claims**

11 **A. Dugan's Claim that the Government's Expert Witness Violated Federal 12 Rule of Evidence 704(b)**

13 Dugan claims that Agent Matthew Rammes violated Rule 704(b) which prohibits an
 14 expert from stating an opinion or inference as to whether the defendant did or did not have
 15 the mental state or condition constituting an element of the crime charged. Dugan
 16 complains that Rammes gave the following testimony:

17 Q. Do you have an opinion as to whether the defendant maintained his
 18 residence at Ebbeson Street for the purpose of manufacturing and
 distributing marijuana?

19 A. I do.

20 Q. And what is that opinion?

21 A. I also believe that the defendant maintained his residence for the
 22 purpose of cultivating marijuana.

23 Q. Do you have an opinion as to whether the defendant possessed, with
 an intent to distribute, marijuana?

24 A. I do.

25 Q. What is your opinion as to that subject?

26 A. I also believe that the defendant possessed his marijuana with the
 27 intention of distributing it.

28 Tr. 408-09.

Counsel made no contemporaneous objection to the questions. The testimony was

1 given in the context of *modus operandi* testimony which is permissible. See *United States*
2 *v. Gonzales*, 307 F.3d 906 (9th Cir. 2002). Although the questions here were improperly
3 phrased, they were most likely interpreted as indicating that a person in the circumstances
4 in the case would have maintained the marijuana for the purposes of manufacturing and
5 distribution. Defense counsel may have not objected for strategic reasons. In addition, the
6 evidence other than Rammes's testimony overwhelmingly suggested Dugan's intentional
7 cultivation and distribution. Therefore, any inadmissible opinion testimony was harmless.

8 **B. Dugan's Claim that the Government's Expert Witness Violated Federal**
9 **Rule of Evidence 702**

10 Dugan claims that Agent Matthew Rammes violated Rule 702 when he
11 testified that a marijuana plant "that's five inches tall must have some sort of root structure
12 for it to continue growth." Tr. 531. Dugan claims that Rammes had no foundation for such
13 testimony. Admittedly, Rammes's foundation for such testimony was weak. His foundation
14 came from his experience in marijuana investigations, training courses and talking with
15 others but nothing suggested that any of this background would have dealt with
16 distinguishing plants with root structures from cuttings which had not yet developed roots.
17 However, it was Dugan who on cross-examination asked the question of how Rammes
18 could know whether roots had been formed and counsel made no objection to the answer
19 or sought to have it stricken. Any objection was waived.

20 **C. Dugan's Claim that the Instruction on the 21 U.S.C. § 856 Violation Was**
21 **Inadequate**

22 Dugan claims that the court's instruction on the count that charged Dugan with
23 maintaining a place for the purpose of manufacturing drugs under 21 U.S.C. § 856 was
24 inadequate because it failed to require that Dugan's *primary purpose* in maintaining the
25 place was drug dealing or manufacturing. The court's instruction tracked the language of
26 the statute. Further, the instruction given is consistent with Ninth Circuit law. In *United*
27 *States v. Basinger*, 60 F.3d 1400, 1404 (9th Cir. 1995), the court held as to the § 856 count
28 that the government had to prove that Basinger "(1) knowingly (2) opened or maintained a
place (3) for the purpose of manufacturing, distributing, or using methamphetamine."

1 Dugan's reliance on *United States v. Verners*, 53 F.3d 291, 296 (10th Cir. 1995) for
2 the proposition that Dugan's "primary purpose" had to be the manufacturing or the dealing
3 in marijuana is misplaced. In *Verners* the court held that the primary purpose of the
4 defendant's mother in maintaining her house was as a home for herself and her daughters.
5 There was no evidence that she used her son's bedroom or managed or supervised her
6 son's drug business. Therefore, she could not be found guilty under § 856 because "it is
7 fair to say, at least in the residential context, that the manufacture (or distribution or use) of
8 drugs must be at least one of the primary or principal uses to which the house is put." *Id.*
9 Nevertheless, the court observed that "[w]here the defendant lives in the house, [the
10 maintenance] element is normally easily proved." *Id.* In Dugan's case, there is no question
11 but that Dugan controlled the residence and knew what was going on in the property. The
12 instruction given by the court was in compliance with the law, and even if the court should
13 have instructed that in order for Mr. Dugan to be found guilty, the Government had to prove
14 that he knowingly maintained a place with one of the "primary purposes" being to plan,
15 grow, harvest or distribute marijuana, the omission was harmless. The evidence was
16 overwhelming that Dugan controlled the house and what went on in it.

17 **D. Alleged Perjury**

18 Dugan has submitted a detailed summary of testimony he believes was
19 contradictory and constituted perjury. He accuses government counsel of misconduct and
20 has orally blamed his attorneys for failing to pursue his perjury claims and asserts that they
21 were ineffective. He questions the honesty of testimony concerning, among other things,
22 comments made during the search of his residence, the reasons the officers came to his
23 house, whether the alleged marijuana plants were in dirt, how the plants were counted and
24 the time of his arrest. He also complains that there was mention of a conversation with his
25 wife in light of an earlier stipulation not to do so. Dugan points out alleged inconsistencies
26 in testimony and attributes them to perjury.

27 The court finds no basis for a new trial based upon Dugan's allegations of perjury or
28 ineffective assistance of counsel. The inconsistencies he alleges are based upon evidence

1 available at trial and useable in cross-examination. There is no evidence that justifies a
2 finding of perjury. Many of the alleged inconsistencies are not material to a critical issue in
3 the case. The allegedly barred testimony about a conversation with his wife was curtailed
4 and harmless. No inadequacy of counsel claim has been effectively raised. Further,
5 inadequacy of counsel is more appropriately raised in a motion under 28 U.S.C. § 2255.


6 **Alleged Speedy Trial Act Violation**

7 Dugan claims that his case was not brought to trial within the requirements of the
8 Speedy Trial Act. Although there was considerable delay, much was caused by the
9 defense. A close examination of the transcript reflects that Dugan engaged in
10 gamesmanship which resulted in much of the delay. In any event, the government's
11 Speedy Trial Act computation (docket # 263 filed March 10, 2008) shows that Dugan's
12 rights under the act were not violated even if the originally assigned trial judge had no
13 power to exclude time once he announced he was going to recuse himself. Dugan's
14 motion for a violation fo the Speedy Trial Act is denied.

15 **Order**

16 Dugan's new trial motions are denied except on the issue of the number of
17 marijuana plants. As to that issue, the motion is granted. The government may elect to
18 retry the issue as to the number of plants or agree that Dugan will be sentenced for having
19 more than 100 and less than 1000 plants. All other motions including the motion to dismiss
20 for violation of the Speedy Trial Act are denied.

21
22 Dated: 12/17/08

23 
24 RONALD M. WHYTE
25 United States District Judge
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27
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1 Copy of Order E-Filed to Counsel of Record:
2 Hand-Delivered to Defendant on 12/18/08.
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